

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 3-99:

BILLINGS EDUCATION ASSOCIATION, MEA/NEA,

Petitioner,

- vs -

BILLINGS SCHOOL DISTRICT,

Respondent.

FINAL ORDER

The above-captioned matter came before the Board of Personnel Appeals (Board) on October 19, 2000. The matter was before the Board for consideration of the Notice of Appeal/Exceptions to the Hearing Officer's Decision filed by Ingrid Gustafson, attorney for the Petitioner, to the Findings of Fact; Conclusions of Law; and Recommended Order of Michael T. Furlong, Hearing Officer, dated April 26, 2000.

Appearing before the Board were Ingrid Gustafson, attorney for the Petitioner, and Larry Martin, attorney for the Respondent. Both parties appeared in person.

After review of the record and consideration of the arguments, the Board concludes and orders as follows:

1. IT IS HEREBY ORDERED that the Petitioner's appeal is dismissed.
2. IT IS FURTHER ORDERED that the Findings of Fact; Conclusions of Law; and Recommended Order is affirmed.

DATED this 3rd day of November, 2000.

BOARD OF PERSONNEL APPEALS

By: 

Jack Holstrom
Presiding Officer

Board members Holstrom, Vagner and Talcott concur.
Board members Schneider and Perkins dissent.

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3 NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by filing a
4 petition for Judicial Review with the District Court no later than thirty (30) days from the service of
5 this Order. Judicial Review is pursuant to the provisions of Section 2-4-701, et seq., MCA.
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7 *****
8 *****

9 **CERTIFICATE OF MAILING**

10 I, Jennifer Jacobsen, do hereby certify that a true and correct copy of this
document was mailed to the following on the 6th day of November, 2000:

11 INGRID GUSTAFSON
12 GRAVES TOENNIS & GUSTAFSON PC
13 207 NORTH BROADWAY
BROADWAY PLACE - SUITE 504
BILLINGS MT 59101

14 LARRY MARTIN
15 FELT MARTIN FRAZIER JACOBS & RAPKOCH PC
16 PO BOX 2558
BILLINGS MT 59103-2558
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18 *****
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 3-99

BILLINGS EDUCATION ASSOCIATION,) Case No. 574-1999

MEA/NEA,

Petitioner,

vs.

BILLINGS SCHOOL DISTRICT,

Respondent.

**FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER**

* * * * *

I. INTRODUCTION

Hearing Officer Michael T. Furlong conducted a hearing in this matter on June 29, and 30, 1999. Petitioner, Billings Education Association, was represented by Ingrid Gustafson, Attorney at law. Respondent, Billings School District, was represented by Laurence R. Martin, Attorney at Law. Petitioner exhibits A, B, C, D, F and G were admitted into evidence without objection. Respondent exhibits 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 were admitted into evidence without objection. The record was held open until November 1, 1999, by request of the parties in order to submit post hearing briefs. Post hearing submissions were filed by the parties and are included in the record.

II. ISSUE

The issue in this matter is whether the Early Family Support Service positions occupied by individuals employed by the Billings School District should be included in the Billing Education Association collective bargaining unit.

III. FINDINGS OF FACT

1. The Billings Education Association (BEA) is the exclusive bargaining agent for approximately 1100 employees in the school district. BEA membership consists primarily of

teachers employed by the district. The collective bargaining agreement between the BEA and the school district states :

Section 1. Recognition: The School District recognized the Billings Education Association as the exclusive representative of teachers employed by the School District as defined in the appropriate unit.

Section 2. Appropriate Unit: The exclusive representative shall represent the members of the appropriate unit which shall consist of all teachers of the School District who are certificated in Class I, Class II, Class IV, or Class V as provided in Section 20-4-106, MCA, or Class VII, and whose position calls for or requires such certification except as noted in this section.

The appropriate unit shall include home-bound teachers, summer school teachers, curriculum workers, speech therapists, speech clinicians, nurses, physical therapists, occupational therapists, audiologists, audiometrists, psychologists, social worker, psychometrists, librarians (elementary and secondary), grant writers, Even Start advocates, Nite Owl teachers who teach during the day, and substitute teachers teaching in the same position for thirty (30) or more consecutive days, and others as stipulated in the hearing and order regarding Unit Clarification Case #71465.

The appropriate unit shall exclude the superintendent, assistant superintendents, principals, assistant principals, directors and assistant directors, administrative assistants, supervisors, coordinators, public information officer, reading tutors, audio-visual technicians, migrant program teachers, home-school coordinator or coordinators, instructional materials center technicians, substitute teachers who teach in the same position less than thirty (30) consecutive days. Substitute teachers, teaching in the same position for thirty (30) or more days, will be placed under contract on the appropriate step of the teacher's salary schedule and have all the benefits and privileges of other members of the unit.

2. The Billings School District is one of seven in-state entities to contract services as a provider in the Early Childhood Intervention (ECI) program, which is administered by the Department of Public Health and Human Services (DPHHS). It is the only school district in Montana to contract as a provider for the ECI program. All other provider organizations are non-profit entities. The ECI program provides services to disabled children under 3 years of age and their families who qualify for the assistance. Providers hire individuals in the capacity of Family Support Specialists (FSS) to provide ECI services to the parents and disabled children. The School District implements the ECI program outside of the school-based curriculum which

includes the pre-school, elementary school, junior high school and high school programs which employ BEA unit members.

3. Funding for the School District ECI program is appropriated by the state legislature and administered through DPHHS. The district provides FSS employees in-kind services such office space, administrative support and supplies. The major allocation to the school district from the state is determined by providing a specific amount per child per month. Wages for FSS employees are paid out of the program funding appropriated by the DPHHS.

4. The school district provides secondary funding for the program known as the "wrap-around" budget which provides additional support services but cannot be used for FSS employee wages. The State funding is not negotiable. DPHHS funds all seven providers across the state the same dollars based on their child counts. The provider program budget with the school district has increased from \$28,000.00 per year to the present budget of \$560,000.00 per year during its 23 year existence.

5. The School District and other providers must competitively bid for the provider contract every two years. Contracts between a provider and the DPHHS can be terminated by either party with 30 days notice. The contract is specific in delineating the services which must be made available to eligible families in addition to the core service of coordination of support provided by FSS employees. The contract specifies the ratio of infants and toddlers that each FSS employee can carry.

6. The School District has employed individuals in the FSS positions for approximately 23 years. Prior to 1990, those individuals performed in the same capacity under other job titles. The program began with one trainer and currently has nine FSS employees. Individuals employed in FSS positions determine needs, plan appropriate goals, and provide teaching strategies and materials to assist families to obtain services needed to raise a disabled child. They interpret intelligence tests and standardized evaluations to formulate Individual Education Plans (IEPs), utilize observation techniques, monitor a child's success, report progress to parents, individualize instruction, manage a learning environment and administer developmental, behavioral, and family gathering assessments. FSS employees spend 69% of their work time in coordination of services, meetings, and travel. They spend 24% of their time

on home visits; approximately 2.5% of that time is spent modeling techniques for parents to assist parents in working with the child.

7. FSS employees are required to have a bachelor's degree in elementary, early childhood, or special education, or in a related field, as well as previous experience working with young children. They are required to become certified in their positions by DPHHS. Certification for FSS employees is based on on-the-job training and completion of a peer review certification process. Prior to 1992, there were no certification criteria for FSS. In 1992, FSS employees began receiving primary certification and then had to have two additional years to apply and obtain full certification. In 1994, the program required that the FSS employees be fully certified.

8. BEA members, including teachers, speech therapists, clinicians, nurses, physical therapists, occupational therapists, audiologists, audiometrists, psychologists, social workers, and psychometrists must obtain certification or other licensure through the Office of Public Instruction or other governing boards. Wages for all the BEA unit employees are paid from the school district's general fund dollars.

9. No FSS employees of the seven state providers under contract with the state are members of a collective bargaining unit. Under the contract terms, FSS employees are paid on an hourly basis and are scheduled to work 1,842 hours per year. They work 12 months per year, including 40 hours per week during the nine month school year. During the summer their work schedules are reduced to 75% of their regular full time hours. They are free to schedule their work time around the availability of parents and children for such services. Their hourly wage rates range from \$15.03 to \$16.07 an hour, with an average hourly wage rate of \$15.52. FSS employees are paid bi-monthly. They are required to turn in time sheets and are paid in accordance with the hours they turn in.

10. The school district calendar which defines the work year for BEA unit members is not followed by FSS employees. Under terms of the collective bargaining agreement, BEA members work 189 days per calendar year or 1,417.5 hours per contract period and are paid on a monthly basis according to the bargaining agreement pay matrix. The starting salary of a BEA unit member is \$21,714.00 or \$15.31 per hour. BEA unit members work 37.5 hours per week

and have consistent schedules, normally working days. The hours worked by BEA members are determined by negotiation and the resulting labor agreement. They are not obligated under the contract to work beyond 189 days per year. However, some BEA members elect to provide additional services for a period of time before and after the school year in addition to the hours they work pursuant to the contract.

11. FSS employees earn vacation days based on working 12 months per year. They are subject to state-mandated leave requirements under Title 2 of the Montana Codes. FSS employees receive holiday pay for specific holidays. They are not provided discretionary leave. FSS employees do not gain tenure during their employment with the school district.

12. BEA members do not earn vacation leave, nor do they take vacation time. BEA unit members are not subject to the State mandated leave requirements under Title 2 of the Montana Codes. Under the terms of the bargaining agreement, BEA unit members are not required to work 12 months per year and they do not receive holiday pay for specific holidays. BEA members are provided discretionary leave as a condition of employment. BEA unit members who are teachers gain tenure as a condition of employment.

13. All school district union and non union employees, including the FSS and BEA unit members, are subject to the same personnel policies as prescribed in the personnel policy handbook. Both FSS employees and BEA unit members have additional policies and procedures specific to their groups. All employees participate in the same health insurance program. FSS employees must be employed for 20 hours per week to get health insurance coverage under the master contract. FSS employees participate in the Teachers Retirement System provided BEA members under the master contract.

14. FSS employees are assigned work areas located at the Lincoln School District Administrative office building. FSS employees work with one family at a time in the family's home. Under the conditions of employment, they are required to provide their own personal transportation. When required to travel to various locations, the FSS employees are reimbursed on a per-mile basis for such travel. Their contact with children typically occurs during home visits when they are modeling for parents. Occasionally, when a child is aging out of the ECI program, FSS employees visit schools at parents' requests to help enroll a child in a school-based

program. One-third of the children served by the FSS employees enroll in school district programs.

15. The district Special Education department administrator oversees the administration of the ECI program. The FSS program co-ordinator, a non-administrative employee of the school district, directly supervises the FSS employees. The FSS program coordinator also evaluates FSS employee performance. The program coordinator reports to the administrator, who reviews and signs evaluations. Evaluations of FSS employees are based upon competencies specifically developed by DPHHS, which include a self-assessment. FSS employees are evaluated using a support staff evaluation form, different from that used to evaluate BEA members. FSS evaluations are based on peer review, parental input, regional and state evaluation reviews, and national accreditation reviews. When an FSS employee is evaluated, the evaluator obtains input for the evaluation from a variety of sources that are not considered during the evaluation of BEA unit members. BEA members are evaluated pursuant to school district policy, as provided by the master agreement (Respondent Exhibit 16). BEA unit members are evaluated primarily by observation.

16. FSS employees interact with school employees of the ECI program when they attend meetings with teachers to discuss the transition of children whose families are served by FSS employees, into school district pre-school programs. A transition meeting occurs once during the potential three years of the ECI employee's service to the disabled child's family. Thirty-two percent of the children whose families are served by the ECI program transition into the pre-school program. FSS employees may arrange for a child to be evaluated by another district employee, such as an audiologist, or may schedule sessions with occupational or physical therapists who are BEA unit members. Typically, the FSS employees will spend 5 to 10 minutes per child coordinating with an occupational or physical therapist.

17. The individuals employed in the FSS positions indicate they have no desire to become members of the collective bargaining unit.

IV. DISCUSSION/RATIONALE

Section 39-31-202 MCA requires that a number of factors be considered in determining the appropriate unit in which employees should be placed for the purpose of collective bargaining. Section 39-31-202 MCA states:

In order to assure employees the fullest freedom in exercising the rights guaranteed by this chapter, the board or an agent of the board shall decide the unit appropriate for the purpose of collective bargaining and shall consider such factors as community of interest, wages, hours, fringe benefits and other working conditions of the employees involved, the history of collective bargaining, common supervision, common personnel policies, extent of integration of work functions and interchange among employees affected, and the desires of the employees.

The evidence in the record does not support a finding that the FSS employees share the predominant community of interests with the employees who are members of the BEA when applying the various factors set forth in § 39-31-202, MCA. There has been no bargaining history during the 23 year period that the district has continued to employ individuals in the FSS positions under contract with the state as a provider for disabled children. The collective bargaining agreement does not include the FSS positions as being members of the bargaining unit. Individuals employed by the district in the FSS positions have clearly expressed that they have no desire to be included as members of the BEA.

There are significant differences in the method of pay and work schedules between the FSS workers and the BEA unit members. Under the terms of the bargaining agreement, BEA members are required to work 1,417.5 hours during the 189 day or 9 month school year period. They are paid on a salary basis and do not turn in time sheets. On the other hand, FSS employees are contracted by the district to work a total of 1,842 hours based on a 12 month work year. They are paid by the hour in accordance with the time cards they are required to submit. BEA members are paid on a monthly basis, whereas FSS employees are paid bi-monthly.

FSS employee duties are predominately unrelated and diverse from the BEA unit members. Billings School District is the only school district in the state to contract as a provider for the ECI program with the DPHHS. Under this unique arrangement, FSS

employees are hired in a specialized capacity to provide assistance to families with children with disabilities who are not enrolled as students with the district, unlike the BEA unit members who work predominately with students enrolled with the Billings Public School System. There is a lack of integration or exchange of work functions between FSS and BEA unit employees. FSS employees have virtually no contact in the performance of their duties with BEA unit members, except when they attend an occasional transition meeting between parents and the school because the child is leaving the ECI program for possible enrollment in a school district program.

FSS employees do not work alongside BEA employees. FSS employee work areas are not located in schools, where the BEA employees customarily are assigned. FSS employees work almost exclusively by themselves, spending nearly all of their time preparing and working with parents of disabled children. FSS perform their work without participating in the district level in-service training provided BEA members.

Another significant difference is found in the regulatory methods used in conducting performance evaluations. In conformance with the provider contract between the DPHHS and School District, criteria for measuring the job performance of FSS employees is developed by DPHHS and subject to state evaluation review. BEA unit member performance evaluations are based on School District policy provided for in the Collective Bargaining Agreement. Organizationally, a non-administrative employee directly supervises the FSS employees, unlike BEA unit members who are supervised directly by the administration.

There are a some factors presented that lean in favor of community of interest between FSS and BEA unit members, such as college education attainment level, professional background and general personnel policies that apply to all union and non-union employees. However, upon weighing all of the pertinent factors, the separate and distinct interests of FSS employees outweigh and override the community of interest shared with BEA unit employees. Therefore, it is found that BEA is not an appropriate unit for FSS employees.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction over this matter pursuant to §39-31-207, MCA.
2. The BEA is not the appropriate bargaining unit for individuals employed in FSS positions by the Billings School District.

VI. RECOMMENDED ORDER

Unit Clarification No. 3-99 is dismissed.

DATED this 26th day of April, 2000.

BOARD OF PERSONNEL APPEALS

By: Michael T. Furlong
Michael T. Furlong,
Hearing Officer

NOTICE: Pursuant to ARM 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than May 19, 2000. This time period includes the 20 days provided for in ARM 24.26.215, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer which sets forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal must be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

Laurence R. Martin
FELT, MARTIN, GRAZIER, JACOBS & RAPKOCH, P.C.
PO Box 2558
Billings, Montana 59103-2558

Ingrid Gustafson
GRAVES, TOENNIS & GUSTAFSON, P.C.
207 North Broadway #504
Billings, Montana 59101

DATED this 26th day of April, 2000.

Carol A. Larkin